

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLMERICA FINANCIAL LIFE  
INSURANCE AND ANNUITY COMPANY,

No C-96-0385 VRW

ORDER

Plaintiff,

v

JOHN DALESSIO,

Defendant.

Defendant John Dalessio and plaintiff Allmerica Financial Life Insurance and Annuity Company ("Allmerica") cross-move for summary judgment on Allmerica's claims for fraud and restitution against Dalessio. For reasons discussed below, Dalessio's motion is DENIED and Allmerica's motion is GRANTED IN PART and DENIED IN PART.

I

On March 31, 1988, Dalessio received a disability insurance policy from SMA Life Assurance Company ("SMA"), Allmerica's predecessor in interest. Dalessio contends that he did

1 not submit an application to SMA, but rather State Mutual Life  
2 Assurance Company ("State Mutual"). In his application, Dalessio  
3 represented that he was in good health. Doc #211 (Kwasniak Decl)  
4 ¶¶2, 5. Dalessio admits that he has been disabled since 1980 with  
5 several physical problems and a severe memory disability. E g, Doc  
6 #243 (Dalessio Decl) ¶10. Dalessio also testified that he signed  
7 the application and that the application contained  
8 misrepresentations and omitted facts. Doc #212 (Shane Decl), Ex B  
9 (Dalessio Depo) at 167:17:20, 177:5-19, 179:9-19.

10 On August 28, 1990, Dalessio filed a claim for disability  
11 benefits. Kwasniak Decl, Ex E. As the basis for his claim,  
12 Dalessio stated that a car accident in 1989 caused him to be  
13 totally disabled. Id. Allmerica paid Dalessio a total of  
14 \$253,527.53 in disability benefits from 1990 until 1995. Kwasniak  
15 Decl ¶21. In October 1995, Allmerica received information from the  
16 federal government that Dalessio had been disabled since 1980.  
17 Allmerica investigated, attempted to rescind the policy by  
18 terminating Dalessio's benefits and filed this diversity action in  
19 1996.

20 On June 28, 2002, the court granted summary judgment in  
21 favor of Allmerica on its claim for rescission and Dalessio's  
22 counterclaims (the "6/28/02 order"). Doc #229. As Allmerica has  
23 since retracted its claim for breach of the implied covenant of  
24 good faith and fair dealing, Doc #272 at 10, the only claims that  
25 remain are Allmerica's claims for fraud and restitution. Both  
26 parties move for summary judgment on the remaining claims.  
27 Allmerica seeks restitution in the amount of \$253,527.53 for  
28 benefits paid less \$8,299.44 in premiums paid by Dalessio, plus

1 attorney fees and interest.

2           Before proceeding to the merits, the court pauses to  
3 address the procedural irregularities attending the present  
4 motions. On February 5, 2004, the court directed Allmerica to  
5 submit its summary judgment motion by March 4, 2004, or to attend a  
6 case management conference. Doc #251. This deadline was extended  
7 to May 6, 2004. Doc #256. On November 19, 2004, Allmerica stated  
8 its intention to file a motion for summary judgment by December 18,  
9 2004. Doc #267. When Allmerica failed to do so, defendant  
10 Dalessio filed his motion for summary judgment on April 27, 2005.  
11 Doc #270. Allmerica filed its opposition and cross-motion on June  
12 16, 2005, exactly 21 days before the scheduled hearing date. Doc  
13 #272. Allmerica did not comply with the 35-day notice period  
14 required in Civ L R 7-2(a) with respect to its cross-motion. As  
15 the cross-motion was not timely, Dalessio claims he could not file  
16 an opposition to the cross-motion within the 21-day notice period  
17 required in Civ L R 7-3(a). Doc #274. Because Dalessio's  
18 arguments and evidence were fully presented in the memorandum in  
19 support of his motion (to say nothing of briefing in connection  
20 with earlier dispositive motions and motions for reconsideration),  
21 the court concludes that Dalessio will not be prejudiced by  
22 adjudication of the motions based on the briefing as it now stands,  
23 especially considering that Dalessio did not avail himself of an  
24 opportunity to reply to Allmerica's opposition. See Civ L R 7-  
25 3(c). The court will, of course, consider Dalessio's memorandum in  
26 support of his motion for purposes of both motions.

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## II

In reviewing a motion for summary judgment, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v Liberty Lobby, 477 US 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence, by affidavit or as otherwise provided in FRCP 56, supporting its claim that a genuine issue of material fact exists. TW Elec Serv v Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir 1987). The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 US at 255. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id at 249.

The evidence presented by both parties must be admissible. FRCP 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine

1 issues of fact and defeat summary judgment. Thornhill Publishing  
2 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). Hearsay  
3 statements in affidavits are inadmissible. Japan Telecom, Inc v  
4 Japan Telecom America Inc, 287 F3d 866, 875 n 1 (9th Cir 2004).

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III

As a preliminary matter, the court considers the parties' evidentiary challenges. Briefly stated, because the statements and evidence contained in the declaration submitted by Dalessio have not affected the disposition of the present motions, Allmerica's motion to strike, Doc #278, is DENIED AS MOOT.

Although Dalessio does not lodge a formal objection, he does argue in passing that Allmerica's "files are sufficiently unreliable as to preclude their use in determining when [Allmerica] received documents." Doc #270 at 12. Putting aside that Dalessio's argument is completely unsubstantiated, the court has found it unnecessary to determine "when [Allmerica] received documents" for purposes of the present motion. Dalessio's objection is accordingly OVERRULED.

IV

The court first addresses the parties' motions respecting Allmerica's claim for fraud. The court notes at the outset that Allmerica's ability to recover damages for fraud has not been compromised by the court's order rescinding the insurance policy. The right to rescission of an insurance contract does not derogate the right to pursue other remedies. Williamson & Vollmer Engineering, Inc v Sequoia Ins Co, 64 Cal App 3d 261, 275 (1976).

1 But Allmerica cannot obtain a double recovery. Cal Civ Code §  
2 1692. In this case, Allmerica seeks punitive damages on its fraud  
3 claim. California courts have allowed plaintiffs to seek punitive  
4 damages for fraud even after summary judgment has been granted on a  
5 claim for rescission. See Cobian v Ordonez, 103 Cal App 3d Supp  
6 22, 28-29 (1980); cf Douglas v Ostermeier, 1 Cal App 4th 729, 750 n  
7 3 (1991).

8 The elements of fraud are (1) a misrepresentation of  
9 material fact, (2) knowledge of falsity, (3) intent to defraud, (4)  
10 justifiable reliance and (5) damages. E g, Engalla v Permanente  
11 Medical Group, Inc, 15 Cal 4th 951, 974 (1997); Cal Civ Code  
12 § 1572. Under Cal Civ Code § 1572, liability for actual fraud is  
13 limited to acts committed with the intent to deceive another party  
14 and induce that party to enter into the underlying contract.

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16 A

17 The court addresses Allmerica's motion first, as it will  
18 not detain the court long. Allmerica does nothing more than argue  
19 that in finding that Dalessio misrepresented material facts on his  
20 application, the court also found fraudulent intent in the 6/28/02  
21 order. The court made no such finding and no such finding was  
22 required. See, e g, Barrera v State Farm Mut Auto Ins Co, 71 Cal  
23 2d 659, 665 n 4 (1969) (observing that under Cal Ins Code § 331,  
24 "whether the insured misstated or concealed certain facts with the  
25 intention to deceive is irrelevant to the right to rescind"). Nor  
26 is it proper at summary judgment for the court to infer Dalessio's  
27 knowledge of falsity and intent to deceive from the fact that  
28 Dalessio made material misrepresentations. Allmerica's motion for

1 summary judgment in its favor on its fraud claim is DENIED.

3 B

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5 Dalessio first argues that he applied to State Mutual,  
6 not SMA, and therefore could not have made any misrepresentations  
7 to SMA. In the 6/28/02 order, the court implicitly found that  
8 Dalessio applied to SMA. Doc #229 at 2. In his motion for  
9 reconsideration of the 6/28/02 order, Dalessio advanced the same  
10 argument that he could not have made any misrepresentations to SMA  
11 because he applied to State Mutual. Doc #242. The court declined  
12 to address the merits of this argument because the supporting  
13 evidence was available before the parties submitted their earlier  
14 cross-motions for summary judgment and Dalessio did not establish  
15 any other ground for reconsideration. Doc #251 at 4. In effect,  
16 Dalessio again requests reconsideration of the court's finding that  
17 Dalessio misrepresented facts on his application based on evidence  
18 that was available when the parties filed their cross-motions in  
19 2002.

20 Although the "law of the case" doctrine is not an  
21 absolute bar from reconsideration, courts generally reconsider  
22 previously decided questions only in cases in which there has been  
23 an intervening change of controlling authority, new evidence has  
24 surfaced or the previous disposition was clearly erroneous and  
25 would work a manifest injustice. Leslie Salt Co v United States,  
26 55 F3d 1388, 1393 (9th Cir 1995). Reliance upon an earlier order  
27 granting summary judgment as law of the case for purposes of a  
28 subsequent motion for summary judgment is inappropriate when new

1 evidence has been developed in the intervening period. See Cable &  
2 Computer Technology Inc v Lockheed Sanders, Inc, 214 F3d 1030, 1038  
3 (9th Cir 2000). But that is not this case.

4 Even if the court were to treat Dalessio's proffered  
5 evidence as new, the court would conclude that Dalessio is not  
6 entitled to summary judgment on this basis. Dalessio's argument is  
7 based upon a single piece of evidence: Two checkboxes appear at  
8 the top of "Part II" of Dalessio's application. Next to one reads  
9 State Mutual's full name; next to the other reads SMA's full name.  
10 Below the checkboxes is a parenthetical instruction to "[c]heck  
11 applicable box(es)." The box checked on Part II of Dalessio's  
12 application corresponds to State Mutual. Doc #1 (Compl), Ex B.

13 Viewed in context, the court finds this to be  
14 inconsequential. First, Dalessio testified that the only portion  
15 of Part II of his application that is in his handwriting is his  
16 signature at the bottom of the page, and that the rest of Part II  
17 was filled out by a medical examiner. Dalessio Depo at 174:17-19.  
18 Further, on "Part I" of the application, checkboxes corresponding  
19 to both SMA and State Mutual are checked. Compl, Ex B. On the  
20 amendment to the application (which bears Dalessio's signature),  
21 only the box corresponding to SMA is checked. Id, Ex C. Dalessio  
22 paid his first premium with a handwritten check payable to SMA.  
23 Doc #92, Ex E. And countless policy riders and other documents  
24 sent to Dalessio would have made it abundantly clear to Dalessio  
25 that SMA was his insurer. One reasonable inference that can be  
26 drawn from this evidence is that the individual who filled out Part  
27 II of Dalessio's application mistakenly checked the box  
28 corresponding to State Mutual. At best, there is an issue —



1 perhaps material, perhaps not — regarding the insurance company to  
2 which Dalessio intended to apply.

3           Even if Dalessio could conclusively show that he applied  
4 to State Mutual rather than SMA, that would not necessarily end the  
5 inquiry. California courts have adopted the doctrine of "indirect  
6 deception," whereby contractual privity is not a *sine qua non* to a  
7 claim for fraud. See, e g, Geernaert v Mitchell, 31 Cal App 4th  
8 601, 605-09 (1995). Under this doctrine, Dalessio is entitled to  
9 summary judgment if he can show that he had no reason to expect  
10 that SMA would rely upon the misrepresentations in his application.  
11 See id at 609 (implying that summary judgment is not appropriate  
12 unless the defendant "had no reason to expect reliance by the  
13 plaintiffs"). Dalessio has made no such showing. To the contrary,  
14 in addition to the application materials bearing a check mark next  
15 to SMA's name, there is other evidence that Dalessio was aware that  
16 he was applying to SMA, not State Mutual. See Doc #92 (Gong Decl)  
17 ¶3 (suggesting that the agent who sold Dalessio the policy led  
18 Dalessio to believe that he was applying to SMA). Accordingly,  
19 summary judgment cannot be granted on this basis.

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22           Next, Dalessio argues that Allmerica cannot prove that  
23 Dalessio knew his representations were false.

24           During his deposition, Dalessio testified that his "No"  
25 answer to the question on the application asking whether he had  
26 ever received benefits "was incorrect because I was receiving  
27 partial disability from the federal government, and I would have  
28 been aware of it at th[e] time [the application was completed]

1 \* \* \*." Dalessio Depo at 258:19-21 (emphasis added). Dalessio  
2 contends this statement is inadmissible, relying primarily upon the  
3 court's earlier ruling that because Dalessio has no long term  
4 memory of events that occurred after 1980, Dalessio lacks the  
5 personal knowledge necessary to testify competently about events  
6 that occurred after that time in the absence of supporting evidence  
7 such as his personal records. Doc #229 at 2-3.

8 Dalessio attempts to extend the court's previous  
9 evidentiary ruling too far. The court ultimately struck a portion  
10 of Dalessio's sworn affidavit in which he stated that he "[knew]"  
11 he performed legal services in 1989 because, in the absence of any  
12 explanation for his ability to recall this particular fact, it  
13 contradicted his deposition testimony that he could not recall most  
14 particulars from that time frame. In contrast, Dalessio's  
15 statement that he would have known he was receiving partial  
16 disability payments at the time he completed his insurance  
17 application was made at his deposition. The difference is  
18 significant because Dalessio "rel[ied] on his review of documents  
19 and his notes, calendars, and other resources" for purposes of his  
20 deposition testimony. Shane Decl, Ex A.

21 In any event, "evidence of the falsity of a  
22 representation is sufficient to raise a triable issue of fact as to  
23 the elements of the knowledge of the falsity." Hart v Browne, 103  
24 Cal App 3d 947, 957 (1980) (citing Maxson v Llewelyn, 122 Cal 195  
25 (1898)). Dalessio has failed to carry his burden of demonstrating  
26 the absence of a triable issue of fact regarding his knowledge of  
27 falsity. It matters not, then, that Allmerica did not address  
28 knowledge of falsity in its opposition.

Next, Dalessio contends that there is no evidence sufficient to create a genuine issue of material fact regarding his fraudulent intent. Dalessio relies primarily upon the fact that he provided the name of his treating physician on his application, as well as "all of the information needed to obtain his complete medical records from every source." Doc #270 at 14. For the proposition that "California courts have found similar facts to be strong circumstantial evidence that an insured did not intend to mislead an insurer," *id.*, Dalessio cites United Fidelity Life Ins Co v Emert, 49 Cal App 4th 941 (1996), and Rutherford v Prudential Ins Co, 234 Cal App 2d 719 (1965).

Apparently, Dalessio cites United Fidelity for its remark that "[p]resumably any insured who lies about his medical condition on the application is also likely to omit his treating physician or entity with information regarding the true state of his health." 49 Cal App 4th at 945. This does not support Dalessio's argument for two reasons. First, the court was addressing an insurer's attempt to overcome an incontestability clause by arguing that it could not have meaningfully investigated any fraud on the part of the defendant without the name of his doctors. The court was merely emphasizing that there was nothing special about the case that would justify removing the incontestability bar. Second, even taking the statement at face value, the court's suggestion that fraudfeasors "likely" will not include certain sources of information on their application does not amount to a rule that entitles a defendant-insured to summary judgment simply because he included sources of information from which the truth could be

1 ascertained.

2           Although more cogent, Rutherford is also unavailing.  
3 There, the surviving widow of an insured obtained a jury verdict  
4 against an insurer on her claim for benefits under the policy  
5 issued to the insured-decedent, and the insurer appealed the trial  
6 court's denial of its motion for judgment notwithstanding the  
7 verdict. Rutherford, 234 Cal App 2d at 721-22. One issue on  
8 appeal was whether the insured was entitled to judgment due to  
9 misrepresentations of material fact contained in the application.  
10 The appellate court let the verdict stand because the insured was  
11 led to believe by the agent for the insurer that the omitted  
12 information was not material. In this regard, the insured's "good  
13 faith and belief that he had made complete, thorough and accurate  
14 representations to the insurance company [was] supported by the  
15 fact" that he had authorized the release of his medical history and  
16 provided the name of a doctor who had performed a procedure that  
17 had not been disclosed on the application. Id at 731. Like United  
18 Fidelity, however, Rutherford does not preclude a finding of  
19 fraudulent intent as a matter of law.

20           To be sure, if the trier of fact finds that Dalessio  
21 included all sources of information from which Allmerica could have  
22 ascertained Dalessio's true medical history, a finding in his favor  
23 on the fraud claim could hardly be second-guessed. But because the  
24 factfinder could conclude that Dalessio knew at least some of his  
25 representations were false when made, the factfinder could further  
26 infer intent to deceive. See, e g, Griswold v Morrison, 53 Cal App  
27 93, 101 (1921) ("A misrepresentation knowingly made is sufficient  
28 to warrant an inference of fraudulent intent \* \* \*."), disapproved

1 on other grounds, Gagne v Bertran, 43 Cal 2d 481 (1954); cf Gagne,  
2 43 Cal 2d at 488 ("Defendant's intent to induce plaintiffs to alter  
3 their position can be inferred from the fact that he made the  
4 misrepresentations with knowledge that plaintiffs would act in  
5 reliance on them."). Dalessio has therefore failed to carry his  
6 burden of demonstrating the absence of a triable issue of fact  
7 regarding his intent to deceive.

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10 Next, Dalessio argues that Allmerica cannot show that it  
11 actually and reasonably relied upon the misrepresentations  
12 contained in Dalessio's application. The thrust of Dalessio's  
13 argument is that Allmerica cannot be trusted and therefore "the  
14 Court must draw the strongest allowable presumptions and  
15 inferences" in Dalessio's favor, viz, "that prior to issuing the  
16 policy [Allmerica] requested and received [Dalessio]'s medical  
17 records from [Dalessio]'s attending physician, and that these  
18 records revealed [Dalessio]'s prior illnesses, provided the name of  
19 [Dalessio]'s psychiatrist and thus access to all of [Dalessio]'s  
20 medical records." Doc #270 at 15-17.

21 The only cogent aspect of Dalessio's argument is his  
22 suggestion that Allmerica received Dalessio's medical file kept by  
23 his attending physician (as opposed to simply an attending  
24 physician's statement ("APS")), which in this case stated that  
25 Dalessio's health was "[e]xcellent," e g, Shane Decl, Ex E), prior  
26 to issuing the policy. This is not the first time Dalessio has  
27 advanced this argument. But now, as before, "[a]s there is not  
28 evidence that Allmerica received Dalessio's medical files before it

issued the policy, this argument fails." Doc #229 at 9.

The remainder of Dalessio's argument is predicated upon his allegation that Allmerica and its agents have made numerous false or contradictory statements in the course of this litigation. Simply put, the portions of the record cited by Dalessio do not substantiate his accusations. Accordingly, the court has no trouble declining Dalessio's invitation to indulge in the presumption that, before the policy issued, Allmerica had obtained medical records that disclosed the true state of Dalessio's medical affairs. Dalessio has failed to carry his burden of demonstrating the absence of a genuine issue regarding Allmerica's reasonable reliance upon his application.

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In sum, based on the record before the court, the court cannot say that the trier of fact could not reasonably infer that Dalessio made false statements on his insurance application with knowledge of their falsity and intent to deceive and induce SMA to issue the policy. Resolution of issues of knowledge and intent almost certainly turn upon credibility determinations that would be improper at this time. Because Dalessio has failed to demonstrate that the trier of fact could not permissibly find fraud on the present record, his motion for summary judgment on Allmerica's claim for fraud is DENIED.

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V

The last issue before the court is restitution. Relief based on rescission may be granted to the aggrieved party, including restitution of benefits and any consequential damages so long as no duplicate or inconsistent relief is granted. Cal Civ Code § 1692. The court may also adjust the equities between the parties as justice may require. Id.

Allmerica argues that it is entitled to restitution as result of the rescission granted in the 6/28/02 order. Allmerica asks for the amount of benefits it paid to Dalessio (less premiums paid by Dalessio), attorney fees and interest. Dalessio argues that Allmerica should be denied restitution under the doctrine of unclean hands.

A

The doctrine of unclean hands bars relief to a plaintiff who has violated conscience, good faith or other equitable principles relating to the transaction that gave rise to the cause of action. Dollar Systems, Inc v Avcar Leasing Systems, Inc, 890 F2d 165, 173 (9th Cir 1989). The doctrine does not apply to misconduct that occurs after the cause of action accrues. Id. Additionally, courts do not apply the doctrine of unclean hands where the defendant has suffered no harm as a result of the plaintiff's actions. Chitkin v Lincoln Nat'l Ins Co, 879 F Supp 841, 854 (SD Cal 1995).

The misconduct alleged by Dalessio does not rise to the level of unclean hands. Due to the material misrepresentations contained in Dalessio's application, Allmerica had the right to rescind the policy immediately upon its issuance. See Dollar

1 Systems, 890 F2d at 173. Putting aside that most of the alleged  
2 instances of misconduct have not been substantiated by Dalessio,  
3 see Carmen v San Francisco Unified Sch Dist, 237 F3d 1026, 1030  
4 (9th Cir 2001) ("[T]he district court may limit its review to the  
5 documents submitted for the purposes of summary judgment and those  
6 parts of the record specifically referenced therein." (emphasis  
7 added)), and putting aside that those portions of the record that  
8 are referenced do not exist, compare, e g, Doc #270 at 20 n 57  
9 (citing Doc #243, Ex T at 173-74), with Doc #243 (containing no  
10 exhibit "T" nor any deposition transcript pages numbered "173" or  
11 "174"), most of the alleged misconduct would have occurred after  
12 Allmerica's right to rescind accrued (e g, illegal withholding of  
13 benefits, filing of false complaint, discovery abuses, prolonged  
14 depositions, untimely pleadings, fabrication of evidence, Doc #270  
15 at 20). Accordingly, these instances of alleged misconduct cannot  
16 support a defense of unclean hands. See Dollar Systems, 890 F2d at  
17 173. Only the allegation that Allmerica altered his application  
18 warrants discussion because such alteration would have occurred  
19 before Allmerica's right to rescind accrued.

20           Dalessio argues that alteration of an insurance  
21 application is a crime and this criminal conduct bars recovery.  
22 But there is no evidence that Allmerica or its predecessor altered  
23 Dalessio's application. Apparently, Dalessio's accusation is based  
24 on his assertion that he applied to State Mutual, not SMA:  
25 "[U]nder California law, [Allmerica]'s use of [Dalessio]'s  
26 application to State Mutual without his knowledge or permission  
27 constitutes an alteration of his application \* \* \*." Doc #270 at  
28 10. Dalessio cites Cal Ins Code § 10382, which prohibits



1 alteration of an insurance application but in no way supports the  
2 theory of constructive alteration advanced by Dalessio. There is  
3 simply no evidence that Allmerica (or its predecessor) actually  
4 altered Dalessio's application.

5 Because Dalessio failed to establish any misconduct by  
6 Allmerica that pre-dates Allmerica's right to rescind the contract,  
7 Dalessio's motion for summary judgment in his favor on Allmerica's  
8 claim for restitution is DENIED.

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10 B

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12 Although the court concludes that Allmerica is entitled  
13 to restitution by virtue of the court's earlier judgment in its  
14 favor on its claim for rescission, Allmerica has failed to provide  
15 evidence by which the amount of restitution can be ascertained. As  
16 the court observed in the 6/28/02 order (at page 2), there is  
17 evidence that Allmerica paid Dalessio \$253,527.53 in disability  
18 benefits, see Doc #211 (Kwasniak Decl) ¶21. Although counsel for  
19 Allmerica represents that Dalessio paid \$8,299.44 in premiums, see  
20 Doc #272 at 3, 8, Allmerica neither provided supporting evidence  
21 nor pointed to evidentiary support already contained in the now  
22 rather unwieldy record.

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25 Allmerica requests attorney fees in connection with its  
26 claims for rescission and restitution. Under Cal Civ Code § 1692,  
27 the court may award attorney's fees to a party prevailing on a  
28 claim for rescission and restitution. The manner in which the

1 court exercises its discretion in this respect is, however,  
2 governed by federal law. In a rescission case applying § 1692, the  
3 Ninth Circuit summarized the applicable law on discretionary fee  
4 awards:

5 A prevailing federal litigant ordinarily may not,  
6 absent statute or enforceable contract, collect  
7 attorneys' fees. However, a court may assess  
8 attorneys' fees when the losing party has acted in  
9 bad faith, vexatiously, wantonly, or for oppressive  
10 reasons. Bad faith may be found, not only in the  
11 actions that led to the lawsuit but also in the  
12 conduct of the litigation.

13 Dollar Systems, 890 F2d at 175 (citations and quotations omitted).  
14 Further, "[a]n award of attorneys' fees for bad faith is punitive  
15 and the penalty can be imposed only in exceptional cases and for  
16 dominating reasons of justice." Id (citations and quotations  
17 omitted).

18 This case is exceptional in that it is now in its tenth  
19 year despite the relative simplicity of the issues. Although it  
20 appears that Allmerica bears some responsibility for this state of  
21 affairs, there can be little doubt that Dalessio has prolonged  
22 these proceedings with duplicative dispositive motions (including  
23 at least one motion for reconsideration), premature appeals and a  
24 motion to recuse the undersigned. But Allmerica's assertion that  
25 "[b]ut for" Dalessio's conduct it would not have been burdened with  
26 this litigation, Doc #272 at 8, is insufficient under the standard  
27 set forth in Dollar Systems. In any event, it is best to refrain  
28 from awarding fees until all claims have been adjudicated. Only  
then can the equities be balanced in a fully informed manner.

1 Allmerica also seeks interest from the time it first  
2 started to pay out benefits in 1990. "State pre-judgment interest  
3 rules are to be applied in diversity cases." James B Lansing  
4 Sound, Inc v Nat'l Union Fire Ins Co, 801 F2d 1560, 1569 (9th Cir  
5 1986). Pursuant to Cal Civ Code § 3287(a),

6 [e]very person who is entitled to recover damages  
7 certain, or capable of being made certain by  
8 calculation, and the right to recover which is  
9 vested in him upon a particular day, is entitled  
10 also to recover interest thereon from that day,  
11 except during such time as the debtor is prevented  
12 by law, or by the act of the creditor, from paying  
13 the debt.

14 Under § 3287(a), "[p]rejudgment interest is also due on money paid  
15 as restitution." Irwin v Mascott, 112 F Supp 2d 937, 956 (ND Cal  
16 2000). "In an action based upon rescission of a contract, the  
17 plaintiff's right to repayment of moneys paid under the contract is  
18 fixed by the rescission, and interest on the moneys paid thus is  
19 recoverable from the date of rescission." Leaf v Rauch, 47 Cal App  
20 3d 371, 376 (1975); see also Lund v Cooper, 1259 Cal App 2d 349,  
21 352 (1958).

22 Applying the foregoing principles, because the amount of  
23 restitution due Allmerica is, and was, capable of ready and certain  
24 calculation, Allmerica is entitled to pre-judgment interest at the  
25 rate provided by California law for the difference between the  
26 benefits it paid to Dalessio and the premiums it received from  
27 Dalessio from the date it rescinded the insurance policy, which in  
28 this case is December 18, 2005, the date that Allmerica terminated  
Dalessio's benefits. Kwasniak Decl ¶21.

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The court concludes that Allmerica is entitled to restitution in an amount equal to \$253,527.53 less premiums to paid to Allmerica or its predecessor in interest, plus pre-judgment interest thereon. Upon a proper showing of the premiums paid by Dalessio, Allmerica's claims for rescission and restitution will be fully adjudicated and judgment will be entered at the appropriate time. With these caveats, Allmerica's motion for summary judgment on its claim for restitution is GRANTED.

A motion for attorney fees shall be filed, if at all, following entry of final judgment pursuant to FRCP 54(d)(2). Any request for attorney fees shall conform to the analysis of lodestar fee awards set forth in In re HPL Technologies Sec, Inc Litig, 366 F Supp 2d 912, 919-22 (ND Cal 2005) (Walker, J). See also Willis v City of Oakland, 231 FRD 597, 600-02 (ND Cal 2005) (Walker, J).

## VI

In sum, Dalessio's motion for summary judgment is DENIED. Allmerica's motion for summary judgment in its favor is GRANTED IN PART and DENIED IN PART.

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1           The parties are ORDERED to attend a further case  
2 management conference on March 28, 2006, at 9:00 am, for purposes  
3 of scheduling a pretrial conference and trial date. The parties  
4 may mutually arrange an alternative date for the further case  
5 management conference with the courtroom deputy, Ms Cora Delfin,  
6 415-522-2039, provided that the further case management conference  
7 shall be held no later than April 21, 2006. Once scheduled, the  
8 case management conference will not be continued except upon good  
9 cause shown. The parties shall not file any further dispositive  
10 motions.

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12           SO ORDERED.

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16           VAUGHN R WALKER

17           United States District Chief Judge  
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